Supreme Court, U.S.
FILED

No. _____

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In The

Supreme Court of the United States

PAUL CONTI
and CONTI CORPORATION
(as owner of F/V Providenza),

Petitioners,

v.

UNITED STATES.

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Paul Conti has driftnetted swordfish on the high seas for twenty years. His vessel and gear were designed for the sole purpose of driftnetting. Federal regulation of the fishery began in 1986. The government placed a permanent ban on driftnets in 1999. The ban forced Conti out of business. His claim alleges that his property, the essential implements of his trade, has lost all economic use and value. No alternatives exist. The complaint was dismissed on the government's motion "for failure to state a claim for relief"

The Question Presented is:

Whether a commercial fisherman is entitled to his day in court under the Fifth Amendment's takings clause based on a federal fishery regulation that deprives him of all economic use of (a) his vessel, (b) his fishing gear, and (c) his fishing license, under the given circumstances of the case.

LIST OF INTERESTED PARTIES

The following persons and entities were parties below and have an interest in the outcome of the case and are listed below in accordance with Rule 14.1(b) of the rules of the United States Supreme Court:

Paul Conti.

Conti Corporation

CORPORATE DISCLOSURE STATEMENT

In accordance with Rule 29.6 of the rules of the United States Supreme Court, Petitioner submits the following statement:

Paul Conti owns 100% of the stock of Conti Corporation.

There is no parent corporation.

There is no publicly held company that owns 10% or more of the company's stock.

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PETITION FOR WRIT OF CERTIORARI

Paul Conti and Conti Corporation (as owner of F/V Providenza) petition for a Writ of Certiorari to review the opinion of the United States Court of Appeals for the Federal Circuit entered on May 29, 2002.

OPINIONS BELOW

The opinion of the United States Court of Federal Claims granting the government's Rule 12(b)(4) motion to dismiss is reported at 48 Fed. Cl. 532 (2001) (App.16). The opinion of the United States Court of Appeals for the Federal Circuit dated May 29, 2002 affirming the trial court is reported at 291 F.3d 1334 (App.1). The Order of the Court of Appeals denying Petition for Rehearing En Banc is dated August 30, 2002 and is unreported (App.15).

JURISDICTION

Petitioner seeks review of an opinion of the United States Court of Appeals for the Federal Circuit entered on May 29, 2002. The Order Denying Petition for Rehearing En Banc of that opinion is dated August 30, 2002. This Petition for Writ of Certiorari is filed within 90 days of the date of said Order. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The United States Constitution Amendment V provides in relevant part:

> "Nor shall private property be taken for public use, without just compensation."

Federal Regulation Involved

Final Rule published January 27, 1999 in Volume 64 Federal Register p.4055 provides: "No driftnet may be used to fish for swordfish from the North or South Atlantic swordfish stocks. An Atlantic swordfish may not be possessed on board or harvested by a vessel using or having on board a driftnet."

STATEMENT OF THE CASE

In 1999 The U.S. Department of Commerce through the National Marine Fishery Service (NMFS) promulgated a final regulation permanently banning use of driftnets to fish swordfish in the North Atlantic primarily because of risk of entanglement to the Northern Right Whale, but also because of threat to other marine mammals and turtles, *64 Fed. Reg. 4055*. In April 1999 driftnets were banned in all migratory species fisheries (tuna and shark), *64 Fed. Reg. 29090, 29144, 50 C.F.R. 635.21(D)(1)*. This regulation forced Petitioner completely out of business. He cannot economically or as a practical matter use his vessel, gear or license in any other manner or alternative fishery. He no longer fishes. His boat, nets and fishing license have been rendered useless and valueless and remain idle. The complaint filed herein so alleges (App.25-28). Petitioner began harvesting swordfish, a high seas migratory species, in 1979 exclusively by the use of driftnet gear and vessel. From colonial times the swordfishery was wholly unregulated until 1986 when this species first came under federal management and license to harvest swordfish was first required, *50 Fed. Reg. 33952 (1985), 50 C.F.R. Part 630 (1986), the original Magnuson-Stevens Act of 1976, 16 U.S.C. § 1802(20) did not include highly migratory species such as swordfish, tuna and shark. The Act was subsequently amended to place these species under federal management.* The license issued by the national fishery

service was "open access" meaning anyone could get one without qualification and without restriction on vessel or gear use. But once issued the license could not be revoked at will, or by discretion, but only for substantial cause involving lengthy administrative process and judicial review, *16 U.S.C. § 1858(b).* From 1986 through 1991 the situation was one of license without restrictive regulation until the 1991 catch limit quotas were first put in place, *56 Fed. Reg. 65,007 (1991).* The first gear ban was placed on driftnets in 1997 as a temporary emergency measure, *61 Fed. Reg. 64,486 (1996)* but made permanent in 1999. Petitioner filed a claim against the United States in the Court of Federal Claims for compensation for his vessel, nets and lost earnings under the takings clause of the Fifth Amendment. Jurisdiction in the Federal Claims Court is predicated under *28 U.S.C. § 1491.* Petitioner claims a regulatory taking of his property by reason of loss of all or virtually all *economic use* of his boat, driftnets and swordfish license. The trial court by written opinion granted the government's Rule 12(b)(4) motion to dismiss complaint for "failure to state a claim for relief" finding, (a) no property interest under the takings clause appears in the facts of the complaint, (App.21). The United States Court of Appeals for the Federal Circuit affirmed with opinion (App. 1-21). Petition for Rehearing En Banc was denied (App.22-23).

During the time Petitioner began harvesting swordfish the pendulum has swung from total non-regulation to recent severe regulation. Unfettered access to the fishery existed either by driftnets, longlining or harpoon gear. Federal regulation of this fishery is a recent phenomenon and began in 1986 with "open access" licensing, to quota catch limits in 1991, to ban of driftnets in 1997 by temporary rule, to the 1999 final rule. Petitioner moved to New England waters from the Pacific coast in 1985. Until the 1997 temporary regulatory ban he has fished out of Gloucester, Massachusetts in waters 200 miles from

the shore (EEZ, Exclusive Economic Zone established by *Presidential Proclamation 5030 (1983), 48 Fed. Reg. 10605*) and has lawfully caught swordfish by driftnet. His vessel the *F/V Providenza* built in 1979 at Seattle, Washington is designed specially for use as a driftnet fishing vessel. Driftnets are one of three methods used to harvest swordfish, but is the least commonly used in the industry. Driftnetters like Petitioner comprise only 2% of the swordfish fleet in the U.S. Most swordfish, 98% of the U.S. fleet, are harvested by longline vessels, and to a lesser extent harpoon vessels. A driftnet is a curtain one mile long consisting of 20 inch square meshes that hangs from the sea surface down several fathoms and entangles adult swordfish that swim into it. (App.21-23, 26, 27). The United States Court of Appeals for the Federal Circuit has decided that as a peremptory rule of law there is no property interest in a fishing license under the takings clause and that commercial fishing is non-compensable if restricted by government regulation because as a matter of law the case is no different from case decisions of this Court rejecting property claims in cattle grazing permits . The Court also held that as a matter of law, on review of the complaint that there is no property interest in a particular economic use of Petitioner's boat and nets, namely, to harvest swordfish by driftnet and no "taking" has occurred (App.7-12). Both the trial court and the appeals court conclude that Petitioner has "other sticks in the bundle" (the complaint alleges the contrary), namely, the theoretical "*continuing ability to sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses precludes a finding that a regulatory taking has occurred*"(App.7). Petitioners' prayer in the appeal below is for the opportunity of proving what the complaint asserts, namely that he cannot fish in another fishery, transfer his effort elsewhere, use his vessel and driftnets in another fishery, or sell items that are now valueless for anything more than salvage price.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit Court of Appeals has decided an important question of federal law that has not been but should be settled by this Court. (Rule 10(c), Supreme Court Rules).

(1) The decision of the Federal Circuit is a case of first impression on a matter of federal law of far reaching importance. The constitutional right of commercial fishermen, harvesters of a common resource, to compensation due to regulatory taking has never been defined by this Court or until now, any federal appellate court. Certiorari review will define the full scope of property owned by commercial fishermen protected by the takings clause. It will define the circumstances by which federal fishery regulations may amount to a regulatory taking of the proprietary interests of ocean harvesters. It will ultimately decide whether Petitioners and others similarly situated are entitled to their day in court. Resolution of the Question Presented herein will have immediate and timely effect on fishing entrepreneurs, an entire industry from New England to Hawaii to Alaska experiencing severe economic plight due to increasingly intrusive national fishery regulations. The decision of the Federal Circuit affirming dismissal of the initial pleading on demurrer places the commercial fishing industry beyond the pale of regulatory takings law. Petitioner's property interests identified in the complaint are (a) his specially designed vessel, (b) specially designed nets and gear, (c) the entrepreneurship lately embodied in the fishing license, that produces economic earnings in a business (Conti Corporation) backed by financial investment of capital and human resource.

(2) Certiorari review is needed to establish that capital investment in a prior unfettered right to harvest a

public resource that is later subjected to licensing and later still subjected to gear restriction may comprise property interests protectable under the takings clause of the Constitution.

(3) Certiorari review is needed to settle whether commercial ocean harvesters are precluded from entering the courthouse to seek compensation due to particular regulations that render their vessel, nets, gear and fishing license economically useless and force cessation of business and destruction of livelihood.

(4) Certiorari review is needed to settle whether a regulatory taking claim may be peremptorily dismissed on demurrer to the complaint despite allegations of loss of all or nearly all economic use of the implements of one's trade and the destruction of one's historical business due to recently enacted regulatory measures.

(5) Certiorari review is needed because the Constitution does not define "private property" under the takings clause and the Federal Circuit has decided the case as a threshold issue based on the perception of a "revocable license" when considering the claimed property interest of a fisherman who harvests the ocean's resources---comparing the case to prior decisions dealing with "cattle grazing permits" on government owned land. In the judicial analysis of "property" entitled to compensation for regulatory taking this Court should demarcate the essential distinctions and difference between grazing permits and recently created ocean fishing licenses and the physical assets used to implement commercial fishing licenses. The differences are several and substantial. The Federal Circuit's decision is based on comparison of cattle grazing permits issued under the Taylor Grazing Act, *43 U.S.C. § 315* whereby cattle owners are permitted to access adjacent government owned grazing lands without being trespassers (App.7-9). This

Court has held that said government-created and revocable grazing permits bestow no property rights. In the case at bar the government did not create fishing, it simply regulates it. Petitioner does not venture on government owned property but onto waters *res nullius* that the government subsequently began regulating, and harvests a resource that is public commons, animals *ferae naturae,* until caught. Until 1986 harvesting the resource was an unfettered right, occupation and business backed by capital investment and expectations. There were no regulations until 1986 when a license requirement was first imposed. Unlike a cattle grazing permit this license is occupational in nature, represents a right to carry on a trade, has value measured by earnings from its use and is not "revocable at will", *16 U.S.C. § 1858(B).* It is the means to continue a prior existing livelihood.

(6) Certiorari is needed so that this Court may settle a matter of federal law of considerable importance, namely that a government granted license under particular economic, historical and legal circumstances may be within the protective embrace of the takings clause of the Fifth Amendment if subjected to regulatory intrusion.

II. The Federal Circuit Court of Appeals has decided an important federal question in a way that conflicts with relevant decisions of this Court. (Rule 10(c), Supreme Court Rules).

(1) Question Decided:

The appeals Court has decided a complex regulatory taking case on demurrer and has said that commercial fishermen are barred from seeking relief for a constitutional takings case beyond the initial pleading, that affirmatively alleges that specific property used in one's business has lost

all direct and alternative economic use value under the circumstances due to a regulation prohibiting the historical uses of the property. The appeals Court decided that the complaint fails to allege both a protectable property interest and a taking under the Fifth Amendment. Pivotal to the Federal Circuit's affirmance of peremptory dismissal of the complaint is the Court's finding, "*We agree with the Court of Federal Claims that Mr. Conti's continuing ability to sell the vessel and the gear, fish in a different fishery, or put both the vessel and the nets to other uses....precluded a finding that a regulatory taking had occurred*" (App.18). The complaint distinctly alleges the contrary, namely, a taking of "all the sticks in the bundle",

> "*By reason of the regulatory ban...the vessel has been rendered valueless...and plaintiff is forced to sell a boat which he can no longer use...driftnets which can no longer be used...now useless gillnets...plaintiff cannot transfer or convert his vessel and gear to any other fishery....by reason of ..the small size and range of the F/V Providenza, the design of the vessel and its gear...location for the harvesting of swordfish...limits placed by NMFS on other fisheries etc....entirely dependent for his livelihood on the Atlantic swordfish driftnet fishery...the swordfish permit is Plaintiff's only permit*" (App.42-45).

Petitioner appealed to the Court below for the chance to prove what the complaint asserts above that the regulatory measure in question leaves him with no viable economic alternatives; that all the sticks in his economic bundle are gone.

(1A) Conflict:

By assuming "sticks in the bundle" that do not exist the appeals decision takes issue with the recitals of the complaint instead of construing them favorably and accepting them as true. The decision conflicts with this Court's holding in *Scheur, Administratrix v. Rhodes, Governor of Ohio, et al. 416 U.S. 232 (1974).* In *Scheur* this Court sets the standards for passing on a Rule 12(b)(6) motion to dismiss complaint for failure to state a claim (Rule 12(b)(4) RCFC).

> "*When a federal court reviews the sufficiency of a complaint before the reception of any evidence... its task is necessarily a limited one...The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claim. Indeed it may appear on the face of the pleading that a recovery is very remote and unlikely but that is not the test...the allegations of the complaint should be construed favorably to the pleader...a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that plaintiff can prove no set of facts...which would entitle him to relief.*"

(2) Question Decided:

The Court of Appeals has decided that in the field of regulatory takings jurisprudence whether or not a "taking" has occurred can be decided on the face of a complaint without reception of evidence and a particularized and detailed factual analysis: "*as a matter of law we are unable to hold that on the alleged facts* (in the complaint) *he has asserted a cognizable taking claim*" (App.20-21).

(2A) Conflict:

The decision below is in conflict with several decisions of this Court in the field of regulatory takings law that mandate an ad hoc detailed and complex factual inquiry to determine the issue of "taking". This issue should not be resolved on a demurrer given Petitioners' allegations. This Court created regulatory takings jurisprudence in those cases where the property owner retains possession of his property and where some residual value, salvage value or economic use may still remain. Such cases are referred to as "partial regulatory takings". This Court has declared on several occasions that such cases must be resolved "*by essentially ad hoc factual inquiries....careful examination and weighing of all the relevant circumstances...resisting the temptation to adopt what amounts to per se rules in either direction...entails complex factual assessments of the purposes and economic effects of government action*", *Tahoe Sierra Preservation Council Inc. v. Tahoe Regional Planning Agency et al., 535 U.S. 302 (2002)*. The Federal Circuit's decision sustaining demurrer conflicts with *Tahoe* by espousing an inappropriate facile approach in making "ad hoc complex factual inquiry" utilizing the three *Penn Central infra,* factors, namely on a motion to dismiss complaint. The Federal Circuit's decision conflicts with *Palazzolo v. Rhode Island, 533 U.S. 606 (2001)*, wherein this Court said, "*where a regulation places limitations on land that fall short of eliminating all economically beneficial use, a taking nonetheless may have occurred, depending on a complex of factors including the regulation's economic effect...the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government's action*". These three factors are regarded as the polestar guidelines in determining whether a taking has occurred in partial regulatory takings. They derive from the landmark case, *Penn Central Transportation v. New York City, 438 U.S.*

104 (1978) holding that all regulatory takings cases are fact intensive and nuanced and involve careful weighing of circumstances. Thus in *Tahoe Sierra supra,* Justice O'Connor said in her concurring opinion, "*The court below must consider on remand the array of relevant factors under Penn Central before deciding whether any compensation is due*". This Court has clearly established that a partial regulatory taking case is intensely particularized; therefore, demurrer to a complaint is not the appropriate manner in which to resolve it. The complaint reiterates and explains by general averments the fact that Petitioners are unable to use the vessel or gear in any other manner of fishing or in any other fishery; that vessel and gear have lost all economic use value. Assuming the truth of these allegations, the Federal Circuit opines that Petitioners can still "*sell his vessel and nets*", presumably at salvage value. The Court implies that some residual economic use still exists though the complaint expressly disclaims such to be the case. The peremptory dismissal of a partial regulatory taking claim on the aforesaid basis conflicts with this Court's decisions in *Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)* that establishes the rule that the existence of remaining residual or salvage value does not defeat a takings claim since in such cases a Penn Central analysis would still be required. The example used in this Court's opinion is, a regulation that takes 100% of property's economic use value is a "categorical" taking, whereas 95% diminution in economic use value is a partial taking requiring application of the Penn Central analysis. This Court's opinion in *Tahoe Sierra supra* quotes *Lucas* and repeats this point explicitly. The important federal question decided by the Federal Circuit is that the determination of whether a regulatory taking has occurred in a complex pervasive regulatory scheme can be accomplished by the facile approach of reviewing the condensed facial generalizations of a modern day complaint. This holding is in conflict with decisions of this Court that require "*complex factual assessments*" and

"*careful weighing of the Penn Central factors*". *Pennsylvania Coal Company v. Mahon, 260 U.S. 393 (1922),* marked the beginning of regulatory taking jurisprudence. The case recognizes the symbiosis between police powers, e.g., conservation measures, and compensation when regulation "goes too far". The Court speaking through Justice Holmes stated that the analysis of a regulatory taking is a matter of degree and cannot be disposed of by general propositions, so that each case must be dealt with on its own particular facts.

(3) Question Decided:

The Federal Circuit held that Petitioners' commercial fishing license "*falls short of conferring a cognizable property interest*...and...*compels the conclusion that the permit bestowed a revocable license, instead of a property right*". The appeals Court agreed with the Claims Court that referred to the license as "*a revocable license or privilege*" that conferred no property rights under the Fifth Amendment.

(3A) Conflict: Introductory Statement on This Point.

There are no prior decisions of this Court specifically dealing with or analyzing the proprietary aspects of commercial fishing licenses in the context of the takings clause of the Fifth Amendment. Nonetheless the decision of the Federal Circuit on this important question of federal law conflicts with relevant decisions of this Court, infra, defining the scope of "property" under the Fifth Amendment in analogous contexts. Petitioners' compensable property taken by the driftnet ban regulation are the profits of the business, in addition to the vessel and gear prior to 1986 before licensing was required. After 1986, "property" in the new license is manifested by the continuing profits from its

economic use. The aspect of non-transferability of an "open access" license is meaningless in a Fifth Amendment analysis of property right since anyone could get one anytime and thereafter fish without restriction (until 1991 quotas).

In the context of the above introductory background the Federal Circuit's decision conflicts with the following relevant decisions of this Court that construe "property" under the Fifth Amendment sufficiently broad to encompass Petitioners' fishing license and imbue it with protectability under the takings clause. In *Graham v. Richardson, 403 U.S. 365 (1971)* this Court held, "*the Court has now rejected the concept that constitutional rights turn upon whether a governmental benefit is characterized as a right or a privilege*". The Court said in *Board of Regents v. Roth, 408 U.S. 564 (1972)* "*Liberty and property are broad and majestic terms. They are among the great constitutional concepts purposely left to gather meaning from experience. They relate to the whole domain of social and economic fact*". The Court held in *Barry et al. v. Barchi, 443 U.S. 55 (1979)*

> "*State law has engendered a clear expectation of continued enjoyment of the license absent proof of culpable conduct....it is clear that Barchi had a property interest in his license sufficient to invoke the protection of the due process clause...What was said of automobile drivers' licenses ....is even more true of occupational licenses such as Barchi's: 'Once licenses are issued their continued possession may become essential in the pursuit of a livelihood....the Court has made clear that the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels or money*".

In defining property under the takings clause this Court held in *United States v. General Motors, 323 U.S. 373 (1945)*, "*The constitutional provision is addressed to every sort of interest the citizen may possess. Property under the takings clause denotes the citizen's relationship to the physical thing, as the right to possess,* use and dispose of it".

Certiorari review by this Court is needed to further settle the amorphous concept of what may constitute "property" within the meaning of the Fifth Amendment takings clause as construed and applied to the case at bar. The Court in *Lucas supra* holds that property is definable by the "*background principles of state law or the common law*". The common law from colonial times recognized the right of commercial harvesters to openly access adjoining seas and the high seas, *see The Public Right of Fishery in the Several States*, by Joseph Angell, published 1826. This has always been a rights-based fishery, not a mere privilege, and the advent of "open access" license is a government regulatory grant to Petitioner to continue doing what he had a right to do previously. Proprietorships such as Petitioners' and capitalized business organizations have been built on this expectation. This Court has referred to commercial fishermen as "*peripatetic entrepreneurs*" "*exploiting an important resource*" that belongs to no one until captured, *Douglas, Commissioner v. Seacoast Products, 431 U.S. 265 (1977)*. These income-producing entities apart from the license itself are endowed with exclusivity, transferability and disposability, as any private business would be. The recently created license is needed to carry on the occupation. It is a property interests in the broad understanding of that concept in the light of "*social and economic fact*", *Board of Regents supra*. The decision of the appeals Court discounting any constitutional property interest in Petitioners' business license conflicts with the foregoing decisions of this Court. In the current posture of construing "property" in the Fifth Amendment's takings clause this Court over the years has

established in related contexts a broad application of the concept of sufficient dimension to embrace both the intangible aspect of Petitioners' business and fishing license as well as physical assets, i.e., vessel and gear.

We urge the Court to grant the Petition for Writ of Certiorari; to define the full scope of property owned by commercial fishermen protected by the takings clause; to define the circumstances by which federal fishery regulations may amount to a regulatory taking of the proprietary interests of ocean harvesters; to ultimately decide whether Petitioners are entitled to their day in court.

Respectfully Submitted:

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Dated: November 19, 2002

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United States Court of Appeals for the Federal Circuit

01-5068

PAUL CONTI
and CONTI CORPORATION
(as owner of F/V Providenza),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Filed May 29, 2002

Paul Antinori, of North Andover, Massachusetts, argued or plaintiff-appellant.

Marian E. Sullivan, Trial Attorney, Commercial Litigation Branch, Civil Division, Department of Justice, of Washington, DC, argued for defendant-appellee. With her on the brief were Stuart E. Schiffer, Acting Assistant Attorney General; David M. Cohen, Director; and Deborah A. Bynum, Assistant Director. Of counsel on the brief were Mariam McCall and Deborah Ben-David, Office of the General Counsel, National Oceanic and Atmospheric Administration, Department of Commerce, of Silver Spring, Maryland.

Appealed from: United States Court of Federal Claims

Senior Judge Lawrence S. Margolis

United States Court of Appeals for the Federal Circuit

01-5068

PAUL CONTI
and CONTI CORPORATION
(as owner of F/V Providenza),

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

DECIDED: May 29, 2002

Before NEWMAN, CLEVENGER, and SCHALL, Circuit Judges.

SCHALL, Circuit Judge.

Paul Conti is a swordfisherman. Along with Conti Corporation, he filed suit in the United States Court of Federal Claims seeking compensation under the taking clause of the Fifth Amendment. In his complaint, Mr. Conti alleged that the government's 1999 prohibition on drift gillnet swordfishing in the Atlantic Swordfish Fishery had deprived him of all economic value in his swordfishing permit, his vessel, the F/V Providenza (owned by Conti Corporation), and his swordfishing gear. The Court of Federal Claims granted the government's motion to dismiss the complaint under its Rule 12(b)(4) for failure to state a

claim upon which relief could be granted. Conti v. United States, 48 Fed. Cl. 532 (2001). The court held that the swordfishing ban did not deprive Mr. Conti of the possession of his vessel and swordfishing gear and thus did not constitute a compensable taking of that property. Id. at 537. The court also held that Mr. Conti's swordfishing permit did not give rise to a property interest cognizable under the Fifth Amendment and that it therefore could not be the subject of a taking. Id. at 537-38. Mr. Conti now appeals the court's decision.[1] Because we conclude that the swordfishing ban did not take any of Mr. Conti's property, we affirm.

BACKGROUND

I.

The following facts either are undisputed or are taken from Mr. Conti's complaint. Swordfish are caught using drift gillnets, longlines, or handgear. The drift gillnet technique, utilized by Mr. Conti, consists of deploying specially designed nets (pelagic drift gillnets). The nets are attached to a vessel and are deployed to catch swordfish by entangling them.

Mr. Conti began his swordfishing career in the Pacific Ocean in 1979. Complaint of Plaintiffs-Appellants Paul Conti and Conti Corporation (hereinafter "Complaint") at ¶ 3. That year, he acquired and launched the Providenza, which was specifically designed for driftnetting. Id. Six years later, he moved his base of operations from Seattle, Washington, to Gloucester, Massachusetts, and deployed his vessel and gear off the Atlantic Coast. Id. at ¶ 5. Between

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1 Although both Mr. Conti and Conti Corporation were plaintiffs in the Court of Federal Claims, and although they both have appealed the court's decision, in this opinion we refer only to Mr. Conti.

his arrival in Massachusetts in 1985 and the government's permanent ban on drift gillnets in 1999, Mr. Conti harvested swordfish in the Atlantic Swordfish Fishery using the Providenza. According to Mr. Conti, drift gillnet fishing for swordfish accounted for 100% of his income.

II.

During the period that he fished in the Atlantic Swordfish Fishery, Mr. Conti faced a regulatory regime that increasingly restricted his activities. Pursuant to the 1976 Magnuson-Stevens Act, 16 U.S.C. § 1801 ("MSA") (1994), the Secretary of Commerce possesses the power to regulate fisheries within an Exclusive Economic Zone ("EEZ") that extends from 3 to 200 miles off the United States coast.[2] The Secretary manages the fisheries by approving Fishery Management Plans, which may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment," 16 U.S.C. § 1853(b)(4) (2000), in order to effectuate the MSA's purpose of preserving the fisheries' health, stability, and fish stocks. See 16 U.S.C. §1853(a)(1)(A) (2000). Regulations implementing Fishery Management Plans, often promulgated by the National Marine Fisheries Service ("NMFS"), have the force and effect of law. See 16 U.S.C. §§ 1854-1855; Alaska Factory Trawler Ass'n v. Baldridge, 831 F.2d 1456, 1464 (9th Cir. 1987).

Despite the government's broad de jure power to regulate the Atlantic Swordfish Fishery under the MSA, Mr. Conti alleges that he harvested swordfish without de facto

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2 The MSA defines a fishery as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics." 16 U.S.C. § 1802(13)(A) (2000).

regulatory interference until 1986, when NMFS enacted regulations which had the effect of requiring him to apply for a revocable, non-transferable permit. See Atlantic Swordfish Fishery, 50 Fed. Reg. 33,952, 33,957 (Aug. 22, 1985). Subsequent regulations that were promulgated pursuant to the MSA and other statutes, including the Atlantic Tunas Convention Act, 16 U.S.C. § 971 (1994), the Marine Mammal Protection Act, 16 U.S.C. § 1361 (1994), and the Endangered Species Act, 16 U.S.C. § 1531 (1994), created an increasingly onerous regulatory environment. Many of these regulations were specifically directed to reducing drift gillnet fishing, which had aroused national and international concern on account of that fact that drift gillents ensnare significant numbers of sea turtles and marine mammals, including whales. See, e.g., Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39,157 (July 22, 1997).

In 1989, the United Nations banned the use of drift gillnets in international waters, which led Congress to enact the Driftnet Act Amendments of 1990. G.A. Res. 225, U.N. GAOR, 44th Sess., 85th plen. mtg., U.N. Doc. A/44/225 (1989); 16 U.S.C. § 1826 (1994). The amendments provided for implementing the international moratorium on the use of drift gillnets of a certain length beyond the EEZ and for the imposition of sanctions against nations whose vessels or nationals were not in compliance. 18 U.S.C. § 1826. In 1991, the government began to implement increasingly severe quotas that limited each fisherman's catch using drift gillnets, see Atlantic Swordfish Fishery, 56 Fed. Reg. 65,007 (Dec. 13, 1991), and the NMFS closed the Atlantic Swordfish Fishery entirely from December of 1996 through July of 1998. See Atlantic Swordfish Fishery; Drift Gillnet Emergency Closure, 61 Fed. Reg. 64,486 (Dec. 5, 1996); Atlantic Swordfish Fishery; Extension of Drift Gillnet Emergency Closure, 62 Fed. Reg. 30,775 (June 5, 1997);

North Atlantic Swordfish Fishery; Closure, 63 Fed. Reg. 41,205 (Aug. 3, 1998). Finally, in its ongoing effort to reduce bycatch[3] and preserve the swordfish stock, the NMFS issued a final regulation in January of 1999, prohibiting the use of drift gillnet gear entirely in the Atlantic Swordfish Fishery. Atlantic Swordfish Fishery; Management of Driftnet Gear, 64 Fed. Reg. 4055 (Jan. 27, 1999); 50 C.F.R. §§ 635.71(a)(17), (e)(8) (2000). The object of the ban was to reduce marine mammal and sea turtle catch while conserving swordfish and other marine resources. See 64 Fed. Reg. at 4055. Since the regulation permitted the harvesting of swordfish in the fishery using methods other than drift gillnet fishing, the NMFS sought to mitigate the ban's economic impact by allowing permit holders, for the first time, to sell permits for use with non-drift gillnet gear. See 50 C.F.R. § 635.21(d)(1) (2000).

III.

In December of 1999, Mr. Conti brought suit in the Court of Federal Claims, alleging that the January 1999 ban on harvesting swordfish using drift gillnets constituted a regulatory taking of his fishing permit, the Providenza, and his gillnet gear without just compensation, in violation of the Fifth Amendment. Complaint at ¶ 14. Mr. Conti asserted that the ban had "inversely deprived him of the economically viable use and enjoyment of his property." Complaint at ¶ 12.

In due course, the government moved under RCFC 12(b)(4) to dismiss Mr. Conti's complaint for failure to state a claim upon which relief could be granted. Addressing the

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3 "Bycatch" is defined in the MSA as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards." 16 U.S.C. § 1802(2).

motion, the Court of Federal Claims applied the two-part test for regulatory takings claims that is set forth in M & J Coal Co. v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995). That test requires a claimant to establish 1) a compensable property interest that 2) the government took through regulation. After considering the several property interests asserted by Mr. Conti, the court concluded that none of them could form the basis for a viable taking claim. Conti, 48 Fed. Cl. at 536-540. The court first considered Mr. Conti's fishing vessel and drift gillnet gear. While the court acknowledged that Mr. Conti's ownership of the Providenza and its gear "has traditional characteristics of personal property," the court concluded that the drift gillnetting ban did not take that property. Id. at 536-37. The court reasoned that Mr. Conti's continuing ability "to sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses" precluded a finding that a regulatory taking had occurred. Id. at 537. As for Mr. Conti's efforts to characterize the right to use the permit and his vessel and gear to earn a living as the relevant property interest taken by the regulation, the Court of Federal Claims determined that continued use of Mr. Conti's property for harvesting swordfish with drift gillnets did not constitute a compensable property interest. Therefore, the court held, the right could not qualify as an interest that could be the subject of a Fifth Amendment taking claim. Finally, in the setting of the pervasive regulatory environment circumscribing Mr. Conti's ability to harvest swordfish using drift gillnets in the Atlantic Swordfish Fishery, the court viewed the interest conferred by the swordfishing permit as resembling a revocable license instead of a compensable property right. Id. at 538-39.

DISCUSSION

I.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1295(a)(3) (2000). When reviewing a dismissal for failure to state a claim upon which relief can be granted pursuant to RCFC 12(b)(4), we "must accept as true all the factual allegations in the complaint and we must indulge all reasonable inferences in favor of the non-movant." Sommers Oil Co. v. United States, 241 F.3d 1375, 1378 (Fed. Cir. 2001) (citations omitted). The question that the court must answer in reviewing a Rule 12(b)(4) dismissal order is whether the trial court was correct in concluding that the facts asserted in the complaint do not entitle the plaintiff to a legal remedy. Id. A trial court should not dismiss a complaint for failure to state a claim unless it is "beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Ponder v. United States, 117 F.3d 549, 552 (Fed. Cir. 1997) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Whether the Court of Federal Claims properly dismissed a complaint for failure to state a claim under Rule 12(b)(4) is a question of law that we review independently and without deference. Highland Falls-Fort Montgomery Cent. Sch. Dist. v. United States, 48 F.3d 1166, 1170 (Fed. Cir. 1995).

The Fifth Amendment provides, in pertinent part, as follows: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V, cl. 4. The language of this clause and the jurisprudence interpreting it evince a policy of prohibiting the "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Penn Central Transp. Co. v. New York City, 438 U.S. 104, 123 (1978) (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)). While a taking often

occurs as a result of a physical invasion or confiscation, the Supreme Court has long recognized that "if regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Real property, see Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992), tangible property, see Andrus v. Allard, 444 U.S. 51, 65 (1979), and intangible property, see Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1003-04 (1984), all may be the subject of takings claims.

As the Court of Federal Claims recognized, this court has developed a two-part test to evaluate claims that a governmental regulation constitutes a taking of private property without just compensation. See M & J Coal, 47 F.3d at 1153-54; Karuk Tribe v. Ammon, 209 F.3d 1366, 1374 (Fed. Cir. 2000). First, a court must evaluate whether the claimant has established a "property interest" for purposes of the Fifth Amendment. See M & J Coal, 47 F.3d at 1154. Second, once a court has determined that a property interest exists, it must determine whether a taking occurred. In that regard, we have stated that "it is often important to determine at the outset whether a particular claimed taking was 'categorical' or not." Rith Energy, Inc. v. United States , 247 F.3d 1355, 1362 (Fed. Cir. 2001). A categorical taking has been defined as one in which "all economically viable use, i.e., all economic value has been taken by the regulatory imposition." Palm Beach Isles Assocs. v. United States, 231 F.3d 1354, 1357 (Fed. Cir. 2000). A categorical taking is distinct from a taking "that is the consequence of a regulatory imposition that prohibits or restricts only some of the use that would otherwise be available to the property owner but leaves the property owner with substantial economic use." Id. When a taking is determined to be non-categorical, the court must embark on a fact-based inquiry in which it applies the standard promulgated by the Supreme Court in Penn Central to evaluate whether the governmental action at issue constituted a cognizable taking of the property

interest at issue. Rith Energy, 247 F.3d at 1362. The Penn Central analysis involves "several factors that have particular significance." 438 U.S. at 124. Those factors are the character of the governmental action, the economic impact of the action on the claimant, and the extent to which the action has interfered with the claimant's distinct, investment-backed expectations. Id. However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking under the analysis set forth in Penn Central. M & J Coal, 47 F.3d at 1154; Karuk Tribe, 209 F.3d at 1380.

II.

At the outset, it is important to understand the precise nature of the taking claim that Mr. Conti is asserting. In his complaint, Mr. Conti points to three items of property that allegedly have been taken by the ban on drift gillnet swordfishing: (i) his swordfish permit; (ii) his vessel, the Providenza; and (iii) his gillnets and related gear. Mr. Conti acknowledges that these items were not physically taken from him. After the ban on drift gillnets, his permit remained valid for other types of swordfishing, and he maintained possession of the Providenza and his gear. Rather, what Mr. Conti alleges in his complaint is that "[b]oth his property and his business have been taken by government regulation, which has inversely deprived him of the economically viable use and enjoyment of his property." Complaint at ¶ 12. Mr. Conti states that he has been economically deprived of the use and value of his vessel, nets, gear, and permit and that he has been forced out of the swordfishing business and left with no alternatives for employment. He explains his predicament in ¶ 7 of his complaint:

> By reason of a combination of unique factors, including but not limited, to Plaintiff's age, his economic limitations, his acquired fishing skills, the relatively small size of the F/V PROVIDENZA, the design of the vessel and its gear, the mesh size and configuration of Plaintiff's nets, the limited permits issued to him by NMFS, the season and location for the harvesting of swordfish, and the average annual days at sea, or Plaintiff's historical fishing effort, and the moratoriums, closures and limits placed by NMFS on other fisheries, Plaintiff cannot transfer or convert either his personal effort or his vessel and gear to any other fishery, and is therefore dependent for his livelihood on the Atlantic swordfish driftnet fishery.

In short, Mr. Conti contends that, while he still is in possession of his permit, the Providenza, and his gear, there has been taken from him the ability to use those things in a particular way: to fish for swordfish in the Atlantic Swordfish Fishery using drift gillnets. According to Mr. Conti, because of his unique circumstances, that is the only livelihood that he is capable of pursuing. It is in that respect that he argues his property has been taken. Armed with this understanding of Mr. Conti's taking claim, we turn now to the analysis mandated by M & J Coal.

III.

Our first task under the M & J Coal analysis is to determine whether Mr. Conti has established a "property interest" for purposes of the Fifth Amendment. We begin with the swordfishing permit.

A. The Constitution neither creates nor defines the scope of property interests compensable under the Fifth Amendment. Bd. of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Instead, "existing rules and understandings" and "background principles" derived from an independent source, such as state, federal, or common law, define the dimensions of the requisite property rights for purposes of establishing a cognizable taking. Lucas, 505 U.S. at 1030.[4] These existing rules often involve and define "the citizen's relation to the physical thing, as the right to possess, use and dispose of it." United States v. Gen. Motors, 323 U.S. 357, 378 (1945).

Applying these principles, courts have held that no property rights are created in permits and licenses. See, e.g., United States v. Fuller, 409 U.S. 488, 493 (1973); Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998). In Fuller, the government condemned 920 acres of the respondents' fee lands. 409 U.S. at 489. The respondents also held grazing permits for certain nearby lands. The permits were issued under the Taylor Grazing Act, 43 U.S.C. § 315. During the condemnation proceeding, the parties disputed whether the "value accruing to the fee lands as a result of their actual or potential use in combination with the Taylor Grazing Act 'permit' lands" was compensable. Fuller, 409 U.S. at 489. In addressing the question, the Supreme Court focused on the revocability of the grazing permits and the clear congressional expression in 43 U.S.C. § 315b that the issuance of a permit under the Act "shall not create any right, title, interest, or estate in or to the lands." The Court noted that section 315b makes "clear the congressional intent that no compensable property be created

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4 Though the Supreme Court in Lucas considered a property interest protected by state law, this court has recognized that such an interest may also derive from federal law. See, e.g., Hendler v. United States, 952 F.2d 1364 (Fed. Cir. 1991).

in the permit lands themselves as a result of the permit." Id. at 494. Under these circumstances, the Court held that "the Fifth Amendment does not require the Government to pay for that element of value based on the use of respondents' fee lands in combination with the Government's permit lands." Id. at 493. This was the case even if this "element of value" would warrant a higher selling price for the fee lands on the open market than if the fee lands were offered for sale without it.

In Alves, we adjudicated a petitioner's claim that his grazing preference, which accorded a priority position for procuring a grazing permit under the Taylor Grazing Act, constituted a property interest compensable under the Fifth Amendment. See 43 C.F.R. § 4100.0-5 (1996) (defining a grazing preference). Relying on the Supreme Court's holding in Fuller and the similarity and connection between grazing permits and grazing preferences, we held that "neither constitutes a property interest compensable under the Fifth Amendment." Alves, 133 F.3d at 1457. Instead, "[w]hat is compensable is the fee interest only, divorced from other governmentally-created rights or privileges appurtenant to the fee." Id.

Mr. Conti argues that his swordfishing permit bears no legal resemblance to the grazing permits discussed above, which simply allowed their holders to use property owned by the government. By contrast, Mr. Conti states, the government does not own the fish in the ocean. Mr. Conti's argument is not on point. First, the government has never asserted ownership of the fish in the Atlantic. Rather, pursuant to the regulatory scheme outlined above, the government has broad authority to regulate fishing off the coastline of the United States. See, e.g., 16 U.S.C. § 1801 (1994) (delegating power to the Secretary of Commerce to regulate fisheries within the EEZ that extends from 3 to 200 miles off the United States coast). More importantly, however, Mr. Conti's argument ignores the crucial point that

it is his relationship with the asserted permit—not the government's—that determines whether a property right exists. As the Supreme Court explained in General Motors, 323 U.S. at 378, property interests for purposes of the Fifth Amendment flow from "the citizen's relation to the physical thing."

Applying traditional notions of property and existing rules and understandings, we conclude that Mr. Conti's swordfishing permit, like the grazing permits in Fuller and Alves, falls short of conferring a cognizable property interest. As noted above, the Department of Commerce required that Mr. Conti obtain a permit to harvest swordfish in the Atlantic Swordfish Fishery in the exercise of its authority under the MSA. See 16 U.S.C. § 1811; Atlantic Swordfish Fishery, 50 Fed. Reg. at 33,957. While Mr. Conti could and did utilize his permit to fish for more than a decade, he could not assign, sell, or otherwise transfer the permit. Atlantic Swordfish Fishery 50 Fed. Reg. at 33,957. The rights to sell, assign, or otherwise transfer are traditional hallmarks of property. See Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982) (describing rights to dispose of property and to sell it as part of an individual's bundle of property rights). Further, since the swordfishing permit did not confer exclusive fishing privileges, permit holders like Mr. Conti lacked the authority to exclude others from the Atlantic Swordfish Fishery. See Dolan v. City of Tigard, 512 U.S. 374, 384 (1994) (the "right to exclude others is 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'") (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)). In addition, the government at all times retained the right to revoke, suspend, or modify the permit.

See 50 C.F.R. § 635.4(a)(3) (2000).[5] Finally, the MSA itself states that the limited access authorization system "shall not create any right, title, or interest in or to any fish," and that the Department of Commerce may adopt regulations that limit or terminate a particular permit system "without compensation to holders of any limited access system permits." 16 U.S.C. § 1853(d)(3)(D), (d)(2)(A).[6]

The absence of crucial indicia of a property right, coupled with the government's irrefutable retention of the right to suspend, revoke, or modify Mr. Conti's swordfishing permit, compels the conclusion that the permit bestowed a revocable license, instead of a property right. See 50 C.F.R.

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5 For all intents and purposes, Mr. Conti is asserting a property interest in the government's discretionary decision not to exercise its explicitly granted authority to revoke, suspend, or modify the permit. We decline to recognize such a property interest. See Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 55 (1986) (holding that the federal government's exercise of its preexisting statutory right to amend an agreement precluded the existence of a Fifth Amendment property right in a provision of that contract.).

6 Plainly, the MSA's disavowal of the permit's creation of "any right, title, or interest in. . . any fish," 16 U.S.C. § 1853(d)(3)(D) (emphasis added), is not facially commensurate with a statement that the law does not create any right, title, or interest in the permit. However, to the extent that the right to harvest and thus possess fish in the fishery is inextricably tied to the possession of a permit, the language certainly suggests that since the permit does not confer any cognizable property right to harvest fish, the MSA creates no property right in the permit. In the grazing permit cases, courts interpreting similar language, providing that "a permit . . . shall not create any right, title, interest, or estate in or to the lands," 43 U.S.C. § 315b, reached the corollary result that the Taylor Grazing Act created no property interest in the grazing permit. See, e.g., Alves, 133 F.3d at 1456.

§ 635.4. A contrary holding, as the Supreme Court recognized in Fuller, counterintuitively would compensate a claimant for "the value of a right that the Government . . . can grant or withhold as it chooses." Fuller, 409 U.S. at 493 (quoting United States v. Rands, 389 U.S. 121, 125 (1967)).[7]

B. We turn now to Mr. Conti's claim that the ban on drift gillnet fishing resulted in a taking of the Providenza,

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7 Mr. Conti relies upon Todd v. United States, 292 F.2d 841 (Ct. Cl. 1961), and Jackson v. United States, 103 F. Supp. 1019 (Ct. Cl. 1952), for the proposition that fishermen enjoy property rights in the continued right to fish. Todd and Jackson do not help Mr. Conti, however. In each case, the plaintiff held a permit that had been issued by the State of Maryland that gave the plaintiff the exclusive right to fish in a specified area of Chesapeake Bay. Todd, 292 F.2d at 843; Jackson, 103 F. Supp. at 1019-20. In each case, the permit right could be sold or passed by inheritance. Todd, 292 F.3d at 843; Jackson, 103 F. Supp. at 1020. During World War II, the government severely restricted use of the areas covered by the plaintiffs' permits. The restrictions had the effect of requiring the plaintiffs to cease their fishing activities. In Jackson, the court stated that "the plaintiff had a sort of property right in his fishing ground, and . . . the Government took that property from him." 103 F. Supp at 1020. The court held that the plaintiff had an equitable and a legal claim against the government. Id. at 1021. In Todd, the court held that the plaintiff had an equitable, but not a legal claim against the government. 292 F.2d at 847.

Several considerations make this case different from Todd and Jackson. First, the terms of Mr. Conti's swordfishing permit distinguishes it from the permits in Todd and Jackson. Mr. Conti's permit did not give him exclusive control of an area of the swordfish fishery, and it was not devisable at the time the drift gillnet ban went into effect. Moreover, NMFS, which issued the permit to Mr. Conti, retained the authority to alter the manner in which he used the permit. Finally, both Todd and Jackson were decided before Fuller. We do not need to address here whether they remain viable after Fuller.

his gillnets, and related gear. As explained above, the gist of the claim is that there was a taking because, in light of Mr. Conti's unique circumstances, the ban deprived Mr. Conti of the "economically viable use and enjoyment of his property." Complaint at ¶ 12. The Court of Federal Claims rejected the claim. As we have seen, the court recognized that the Providenza, the gillnets, and the related gear were property that qualified for Fifth Amendment protection. The court concluded, however, that there had not been a categorical taking of this property because Mr. Conti retained possession of it. The court also concluded that Mr. Conti's ability to put the vessel, gillnets, and gear to other uses precluded a holding that a Penn Central regulatory taking had occurred.

Mr. Conti contends that the Court of Federal Claims erred by failing to apply the factors announced in Penn Central, as required in a partial takings analysis. According to Mr. Conti, to the extent that the court correctly recognized his property interest in the Providenza and its gear, it erred by not drawing inferences in his favor and by improperly rejecting his factual assertions that the drift gillnet ban had rendered his property valueless. Accordingly, Mr. Conti argues that we should vacate the trial court's dismissal under RCFC 12(b)(4) and remand the case for a factual determination as to whether a taking occurred.

As a preliminary matter, we observe that, by citing to Penn Central, Mr. Conti appears to recognize that his case does not present a categorical taking. That is because the ban on drift gillnet fishing plainly did not render his vessel and gear valueless, even though Mr. Conti contends that, in view of his unique circumstances, his property has been rendered valueless to him. The question we must answer, then, is whether the Court of Federal Claims erred in dismissing Mr. Conti's complaint under Rule 12(b)(4) without undertaking a Penn Central analysis with respect to the vessel, gillnets, and gear. For the reasons that follow, we conclude that the court did not err.

As we have seen, Mr. Conti's taking claim relating to the Providenza, his gillnets, and related gear is based on his unique circumstances. This is made clear by ¶ 7 of the complaint, which we have quoted above. In brief, Mr. Conti argues that he could only use the specified property for the harvesting of swordfish in the Atlantic Swordfish Fishery using drift gillnets and that the 1999 ban made that use no longer possible. Hence, there was a taking of his property. We are unable to accept Mr. Conti's argument that the limitation on the use of his property that was imposed by the ban on drift gillnet fishing resulted in a taking of that property. We agree with the Court of Federal Claims that Mr. Conti's continuing ability "to sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses," Conti, 48 Fed. Cl. at 537, precluded a finding that a regulatory taking had occurred.

Mr. Conti is arguing that a regulatory taking occurred in this case because the 1999 ban on drift gillnet fishing deprived him of a particular use of his property. The law, however, does not recognize a taking in such circumstances. In Andrus v. Allard, 444 U.S. 51 (1979), the Court confronted regulations that were issued by the Department of the Interior pursuant to the Eagle Protection Act, 16 U.S.C. § 668(a), and the Migratory Bird Treaty Act, 16 U.S.C. § 703. The regulations provided that migratory birds and eagles, and their parts, that were lawfully acquired prior to the effective dates of the statutes could be possessed and transported without a federal permit, but that such birds and their parts could not be purchased, sold, or traded, or offered for purchase, sale, or trade. See 50 C.F.R. § 21.2(a) (1978) (promulgated pursuant to the Migratory Bird Treaty Act); 50 C.F.R. § 22.2(a) (1978) (promulgated pursuant to the Eagle Protection Act). The appellees in the case were engaged in the trade of Indian artifacts. A number of the artifacts were partly composed of the feathers of birds protected by the statutes and regulations, and these artifacts existed before the

statutory protections came into force. Andrus, 444 U.S. at 54. The appellees argued that the prohibition on commercial transactions in pre-existing avian artifacts embodied in the regulations constituted a taking of their property under the Fifth Amendment because the prohibition wholly deprived them of the opportunity to earn a profit from the artifacts. The Supreme Court rejected the claim. In so doing, the Court stated:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights, the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety. In this case, it is crucial that appellees retain the rights to possess and transport their property, and to donate or devise the protected birds.
>
> It is, to be sure, undeniable that the regulations here prevent the most profitable use of appellees' property. Again, however, that is not dispositive. When we review regulation, a reduction in the value of property is not necessarily equated with a taking. . . .

Id. at 65-66 (citations omitted). In Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 122 S.Ct. 1465, 1481 (2002), the Court cited Andrus in the course of

explaining that, in deciding whether a particular governmental action has effected a taking, the Court focuses "both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole." Citing to Andrus, the Court continued: "This requirement that 'the aggregate must be viewed in its entirety' explains why, for example, a regulation that prohibited commercial transactions in eagle feathers, but did not bar other uses or impose any physical invasion or restraint upon them, was not a taking. Andrus v. Allard, 444 U.S. 51, 66 (1979)." Id.

Andrus compels our rejection of Mr. Conti's claim that the ban on drift gillnet fishing resulted in a taking of the Providenza and its gear. We accept as true all of the factual allegations in Mr. Conti's complaint. The problem is that those allegations make out less of a taking claim than the allegations that were advanced in support of the taking claim that was rejected in Andrus. Following the ban on drift gillnet fishing, Mr. Conti is in a far better situation vis-a-vis his vessel and its gear than the appellees in Andrus were vis-a-vis their artifacts in the wake of the Eagle Protection Act and Migratory Bird Treaty Act regulations. Most importantly, Mr. Conti can offer for sale, and can sell, his property, whereas the appellees in Andrus could do neither. We are sympathetic to the situation in which Mr. Conti finds himself following the ban on drift gillnet fishing in the Atlantic Swordfish Fishery. However, as a matter of law, we

are unable to hold that, on the alleged facts, he has asserted a cognizable taking claim.[8]

CONCLUSION

For the foregoing reasons, the decision of the Court of Federal Claims dismissing Mr. Conti's regulatory taking claim for failure to state a claim upon which relief could be granted is

AFFIRMED.

No costs.

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8 It is worth noting that Mr. Conti's taking claim fails for an additional reason. Mr. Conti's ability to use his vessel and gear to catch swordfish using drift gillnets in the Atlantic Swordfish Fishery was dependent upon a permit that was revocable at all times and that, as we have seen, did not constitute a property right for purposes of the Fifth Amendment. In Mitchell Arms, Inc. v. United States, 7 F.3d 212, 217 (Fed. Cir. 1993), we rejected the claim that the Bureau of Alcohol, Tobacco, and Firearms' decision to revoke a permit allowing the importation and sale of certain firearms constituted a taking of the claimant's right to use the permit for those purposes. We stated: "Mitchell's ability to import the rifles and sell them in the United States was at all times entirely subject to the exercise of ATF's regulatory power. Consequently, any expectation which arose on Mitchell's part as a result of the import permits did not constitute a property right protected by the Fifth Amendment." Id. at 217. Likewise, the drift gillnet regulation at issue here has banned a particular use of Mr. Conti's vessel and gear "which was not inherent in its ownership" and was "totally dependent upon the . . . permit issued by" the government. Id.

United States Court of Appeals for the Federal Circuit

01-5068

PAUL CONTI
and CONTI CORPORATION
(as owner of F/V Providenza),

Plaintiff-Appellant,

v.

UNITED STATES.

Defendant-Appellee.

Filed August 30, 2002

ORDER

A petition for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the APPELLEE, and the matter having first been referred as a petition for rehearing to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 6, 2002.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: August 30, 2002

cc: Paul Antinori
Marian E. Sullivan

CONTI V US, 01-5068
(CFC - 99-CV-987)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

In the United States Court of Federal Claims

No. 99-987C
Filed January 11, 2001

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PAUL CONTI, individually, and
CONTI CORPORATION, as owner of
F/V PROVIDENZA
Plaintiff,

v.

THE UNITED STATES,

Defendant.

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Swordfish fishing permit; drift gillnet fishing gear prohibited; Fifth Amendment taking; property right; comprehensive regulation; fishing permit privilege; revocable license.

Paul Antinori, North Andover, Massachusetts for the plaintiff.

Marian E. Sullivan, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, D.C. with whom on the brief were, David M. Cohen, and Deborah A. Bynum, and David W. Ogden, Acting Assistant Attorney General, for the defendant. Marian McCall and Deborah Ben-David, National Oceanic and Atmospheric Administration, of counsel.

OPINION

MARGOLIS, Senior Judge.

This takings claim is before the Court on government's motion to dismiss pursuant to RCFC 1 2(b)(4) for failure to state a claim. After careful consideration of the parties' written and oral arguments, the Court concludes that plaintiff has not stated a claim for relief. The government's motion to dismiss is therefore GRANTED.

FACTS

In ruling on this motion to dismiss, the Court assumes all credible facts as alleged by plaintiff to be true.

Plaintiff, Paul Conti, resides in the port city of Gloucester, Massachusetts where he has harvested swordfish since 1985. Plaintiff has always used drift gillnets. His fishing vessel, the F/V PROVIDENZA, was specially designed and built for use in drift gillnet fishing.[1] Plaintiff

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[1] There are three methods of harvesting swordfish: drift gillnet, longline, and handgear. Longline is the predominant method. On the entire East Coast there are approximately 15 fishermen who use drift gillnets--plaintiff is currently the only one in Gloucester. Drift gillnets are nets, when set end to end, extend about one mile, float six to ten fathoms beneath the surface of the water, and comprise 20 inch mesh size. Longline fishing is considerably different from gillnet fishing, requiring larger vessels and crews and different gear. Longline fishermen can venture far out into the ocean for long periods of time whereas drift gillnet fishing trips last only about 12 to 15 days. Although gillnet gear is prohibited, the use of longline and handgear methods is still allowed. See 50 C.F.R. §§ 635.21(d)(4)(i), (ii), 635.71(a)(17) (2000).

fishes in the Atlantic Swordfish Fishery[2] under a limited access permit issued to him by the National Marine Fishery Service ("NMFS"). The permit allows swordfish harvesting subject to all NMFS regulations. Plaintiff must apply annually for the permit which is valid for the stated period unless revoked, suspended, or modified. See 50 C.F.R. §§ 635.4(a)(6), (k), (m)(2000). Plaintiff generally takes a few fishing excursions per year. In July 1997, plaintiff prepared for his fishing trip by fueling his vessel and making provisions for himself and his crew. Prior to his departure, the United States Coast Guard informed plaintiff that the use of gillnet gear was prohibited and warned him not to embark on his trip. Plaintiff has not fished since that time.

Fishery conservation and management in the United States is complex and pervasive. Fisheries are subject to many regulatory statutes: the Magnuson-Stevens Act, 16 U.S.C. § 1801 et. seq., the Atlantic Tunas Convention Act, 16 U.S.C. § 971 et seq. (implementing the terms of the International Commission for the Conservation of Atlantic Tunas), the Marine Mammal Protection Act, 16 U.S.C. § 1361 et seq., and the Endangered Species Act, 16 U.S.C. § 1531 et seq.. The primary regulatory statute is the Magnuson-Stevens Act, 16 U.S.C. § 1801 et seq, ("Act") which gives the Secretary of Commerce the power to regulate fisheries. The Act aims to prevent overfishing of fish stock while obtaining the maximum yield for each fishery. See 16 U.S.C. § 1851(a)(1)(2000). Fishery management is effected primarily through Fishery Management Plans ("FMP"s), which are prepared and

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2 Fishery is defined as "one or more stocks of fish which can be treated as a unit for purposes of conservation and management and which are identified on the basis of geographical, scientific, technical, recreational, and economic characteristics; and (B) any fishing for such stocks." 16 U.S.C. § 1802(13)(2000).

managed by fishery management councils,[3] see 16 U.S.C. §1852(a)(2000), and approved by the Secretary. See 16 U.S.C. § 1852(h)(1)(2000). These FMPs must contain measures designed to "prevent overfishing and rebuild overfished stock and to protect, restore, and promote the long-term health and stability of the fishery." See 16 U.S.C. § 1853(a)(1)(A)(2000). Further, they must describe the "type and quantity of fishing gear used." & 16 U.S.C. § 1853(a)(2)(2000). The Act also permits the FMPs to "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment." See 16 U.S.C. § 1853(b)(4)(2000). Additionally, an FMP may include quotas, limited access systems, and permit regulations. See 16 U.S.C. § 1853(b)(2000).

In 1985, the South Atlantic Fishery Management Council, in conjunction with the New England, Caribbean, Gulf of Mexico, and Mid-Atlantic Councils, submitted an FMP to the NMFS for the Atlantic Swordfish Fishery. See Atlantic Swordfish Fishery, 50 Fed. Reg. 33,952 (1985). The NMFS' Final Rule adopted a permit requirement for commercial swordfish vessels, began a data collection system to gather more information on drift gillnet use and effects, and enacted seasonal closure times. See 50 C.F.R. §§ 630.4, 630.5, 630.21 (1985). The Secretary approved the NMFS action and the Atlantic Swordfish Fishery has been subject to increasing government regulation ever since.

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[3] Atlantic swordfish, however, are also managed directly by the Secretary of Commerce. See 16 U.S.C. §§ 1852 (a)(3), 1854(g)(2000).

Drift gillnet use became an area of international concern because of large amounts of bycatch.[4] As a result, the United Nations banned their use in international waters in 1989. G.A. Res. 225, U.N. GAOR, 44th Sess., 85th plen. mtg., U.N. Doc A/441225 (1989). In 1991, restrictions on size and quotas were implemented on drift gillnet gear users. See Atlantic Swordfish Fishery, 56 Fed. Reg. 65,007(1991). As a result of the quotas, the drift gillnet gear quota was often met within two weeks. See Atlantic Swordfish Fishery, 58 Fed. Reg. 37,443, 37,444 (1993). In 1995, in order to reduce incidental bycatch, the Atlantic Offshore Cetacean Take Reduction Team was formed. The Team submitted a study and plan to the NMFS to reduce drift gillnet entanglements with marine mammals. Atlantic Offshore Cetaceans Take Reduction Plan, submitted to NMFS by Susan Podziba, Nov. 22, 1996. Further, a provision was added to the Magnuson-Stevens Act, requiring all FMPs and regulations to be consistent with the goal of minimizing bycatch and bycatch mortality. See 16 U.S.C. § 1851(a)(9)(2000). In order to stay within international quotas, the Atlantic Swordfish Fishery is often closed. See Atlantic Swordfish Fishery; Drift Gillnet Emergency Closure, 61 Fed. Reg. 64,486 (1996). In fact, the NMFS closed the entire fishery from December 1996 through July 1998, re-opening for only 14 days in August 1998. See Atlantic Swordfish Fishery, Drift Gillnet Emergency Closure, 61 Fed.Reg. 64,486 (1996); Extension of Drift Gillnet Emergency Closure, 62 Fed. Reg. 30,775 (1997); North Atlantic Swordfish Fishery; Closure, 63 Fed. Reg. 41,205 (1998). In both 1996 and 1997, the swordfish quota was again reduced. See Atlantic Swordfish Fishery; 1996 Quotas, Minimum Size,

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[4] Bycatch is defined as "fish which are harvested in a fishery, but which are not sold or kept for personal use, and includes economic discards and regulatory discards." 16 U.S.C. § 1802 (2)(2000).

Adjustment, 61 Fed. Reg. 27,304 (1996); Atlantic Swordfish Fishery; Annual Quotas, 62 Fed. Reg. 55,357 (1997). In July 1997, the NMFS issued additional restrictions on gillnet use in order to reduce the incidental takes of certain types of whales. See Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Large Whale Take Reduction Plan Regulations, 62 Fed. Reg. 39,157 (1997). Then, in October 1997, the NMFS determined the swordfish stock was overfished and sought ways to rebuild and preserve the stock. See Atlantic Highly Migratory Species; Scoping Meetings, 62 Fed. Reg. 54,035 (1997).

In 1996, The NMFS issued an Emergency Order prohibiting the use and possession of gillnets for harvesting swordfish. See 50 C.F.R. §§ 635.71(a)(17), (e)(8)(2000) ("it is unlawful for any person . . .[to] fish for Atlantic tunas or swordfish with a gillnet . . ."). The Final Rule was issued and then codified in January 1999. See 50 C.F.R. §§ 635.71(a)(17), (e)(8)(2000). The purpose behind the order was to reduce the occurrence of bycatch by drift gillnet fishermen and to improve the conservation and management of the "swordfish resource and other marine resources. . ." See 64 Fed. Reg. 4,055 (1999). It was noted that the 'take" of mammals in the Atlantic Swordfish Fishery by driftnet gear was considerably higher than the incidental "take" for the other gear types. See 63 Fed. Reg. 55,998 (1998). Further, the cost of managing the driftnet fishery is extremely high and because swordfish and a few other species have been deemed overfished, it is not economic. See 63 Fed. Reg. 55,998 (1998). In reaching this decision, the NMFS considered the ban's economic benefits and costs as well as conservation goals. See Atlantic Swordfish Fishery; Management of Driftnet Gear, 64 Fed. Reg. 4,055 (1999). The NMFS also compared those benefits, costs, and conservation goals with the Take Reduction Team's less restrictive plan. See Atlantic Swordfish Fishery, Management of Driftnet Gear, 63 Fed. Reg. 55,998 (1998).

The NMFS order was issued in order to restock swordfish, protect other marine resources and to reduce bycatch. See Atlantic Swordfish Fishery, Management of Driftnet Gear, 64 Fed. Reg. 4,055 (1999). The order bans the possession and use of drift gillnet gear but allows the swordfish harvesting by both the longline and handgear methods.[5] See 50 C.F.R. §§ 635.71(a)(17), (e)(8), 635.21(d)(4)(i)(2000). In order to lessen the impact of the ban, those with permits may sell their permit to another for use with non-drift gillnet gear. See 50 C.F.R. § 635.21(d)(1)(2000). The permits were not previously transferable. See 50 C.F.R. § 635.4(1)(2000).

Plaintiff alleges the ban on drift gillnet use deprives him of his property interests. He argues that all economically viable use and enjoyment of his property has been taken by the NMFS order, constituting a Fifth Amendment regulatory taking. The government alleges that plaintiff has no protectable property interest and therefore his takings claim must fail. Plaintiff claims that at 75 years old he has no other skills and cannot enter an alternative commercial venture. He alleges that the government must compensate him for the F/V PROVIDENZA's loss in value and storage costs, the cost of his gillnets, the loss of anticipated revenue, expenses incurred in preparation for the 1997 fishing trip, and the value of his swordfish permit.

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[5] Longline is generally, "a heavy fishing line. . . several miles long and that has baited hooks in series." Webster's New Collegiate Dictionary 672 (1979). It can be either "anchored, floating, or attached to a vessel . . . [and] retrieved by hand or mechanical means." See 50 C.F.R. § 635.2 (2000). Handgear "means handline [released and retrieved by hand, rather than by mechanical means], harpoon, rod and reel or bandit gear." See 50 C.F.R. § 635.2 (2000).

DISCUSSION

I. National Marine Fishery Service Final Rule

Plaintiff alleges in his complaint that NMFS has failed to comply with all the National Standards mandated by Congress in the Magnuson-Stevens Act in enacting the drift gillnet ban. The government, in its motion to dismiss, correctly notes that plaintiff cannot both challenge the NMFS' action and bring a takings claim in this Court. First, the Magnuson-Stevens Act mandates that challenges to regulations must be brought in a District Court. See 16 U.S.C. § 1855(f)(1)(2000). Second, a claimant must concede an action is authorized in order to bring a valid takings claim. See Florida Rock Industries. Inc.. v. United States, 791 F.2d 893, 899 (Fed. Cir. 1986); Del-Rio Drilling Programs v. United States, 146 F.3d 1358,1362 (Fed. Cir. 1998). An "unlawful" taking cannot support a takings action. See Tabb Lakes. Ltd. v. United States, 10 F.3d 796, 802 (Fed. Cir. 1993). In plaintiff's response brief, he claims that he did "not challenge the government's authority" to issue the regulation, rather that his allegation was a demonstration of the character of the government's action. Taking that statement as true, the Court finds that plaintiff is not challenging the validity of the regulation and will not consider the issue further.

II. Standards for a 12(b)(4) Motion to Dismiss

In deciding a Rule 12(b)(4) motion to dismiss for failure to state a claim upon which relief can be granted, the Court must construe the allegations in the complaint favorably to the plaintiff and draw all reasonable inferences in favor of the plaintiff. See Perez v. United States, 156 F.3d 1366, 1370 (Fed. Cir. 1998). A motion to dismiss cannot be granted "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would

entitle him to relief." See Scheuer v. Rhodes, 416 U.S. 232, 236 (1974) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). Dismissal is appropriate and a hearing unnecessary, however, "where the circumstances alleged in the complaint, even if taken as true . . . cannot establish that a taking has occurred." Atlas Corp. v. United States, 895 F.2d 745, 757 (Fed. Cir. 1990).

III. Standards for Takinus Cases

The Fifth Amendment provides that private property shall not be taken for public use without just compensation. U.S. Const. amend. V. A taking not only occurs by physical possession or occupation, but also by government regulation. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 395, 415 (1922). Only when government regulation goes "too far" does it effect a compensable taking. See M & J Coal v. United States, 47 F.3d 1148, 1153-54 (Fed. Cir. 1995); Pennsylvania Coal, 260 U.S. at 415. A regulation depriving the claimant of the most profitable use of his property, however, is not a per se taking. See Mugler v. Kansas, 123 U.S. 623, 664, 668-69 (1887); Florida Rock Industries, 791 F.2d at 901 ("[t]he fifth amendment . . . does not find a taking in a mere denial of the . . . most profitable use, that would be available in the absence of regulation.")

The Federal Circuit has adopted a two-step analysis for takings claims. See M & J Coal, 47 F.3d at 1153-54. First, the court must determine whether the plaintiff has a property interest within the meaning of the Fifth Amendment. See id., 47 F.3d at 1154; Store Safe Redlands Assoc. v. United States, 35 Fed. C1. 726, 736 (1996). Second, if a property interest is found, then the court performs an "ad-hoc, fact-based inquiry" into "the economic impact of the regulation on the claimant . . . the extent to which the regulation has interfered with distinct investment-backed expectations. . . [and] the character of the government

action." See Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 124 (1978).

A. Plaintiff's fishing vessel and gillnet gear

Plaintiff first purports to have a property interest in his fishing vessel and gillnet gear. His ownership of both has traditional characteristics of private property. Plaintiff has not, however, alleged a physical taking of either the vessel or the gear. Indeed, although plaintiff claims his vessel, gear, nets, provisions, earnings, and the permit constitute a "bundle of rights," he only alleges that the right and opportunity to earn a living and to use his property for that purpose has been taken-not the property itself. Plaintiff has not demonstrated any "set of facts in support of his claim which would entitle him to relief." See Scheuer, 416 U.S. at 236 (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). "[W]here the circumstances alleged in the complaint, even if taken as true . . . cannot establish that a taking has occurred" dismissal is appropriate. Atlas Corp., 895 F.2d at 757. Plaintiff's free to sell the vessel and the gear, fish in a different fishery, or put both the nets and the vessel to other uses. Because a taking of the vessel and/or the gear has not been alleged nor shown, the Court need not consider this issue any further.

B. Plaintiff's Continued Use of Gillnets

Plaintiff next characterizes his property interest as the ability to use his property to earn a living, i.e., to fish with gillnets. Plaintiff asserts that all economically viable use and enjoyment of his property has been taken by the ban, constituting a Fifth Amendment regulatory taking. He argues that his "right and opportunity to earn a living by fishing and to use his property for that purpose" have been taken. Pl Response at 5. He claims compensation for lost revenue,

expenses incurred in preparation for his 1997 trip, his vessel, his gillnet gear, and the prior value of his fishing permit. The government alleges that plaintiff has no property interest in the continued use of drift gillnets in the swordfish fishery, and therefore the takings claim fails at the first level of analysis. Plaintiff argues, however, that by choosing to focus on a claimed interest in the continued use of the permit in a certain manner, the government has ignored many "sticks" in his bundle of rights-his gear and vessel. Although the government and plaintiff appear to allege different property interests, their characterizations have an identical focus: the use of the vessel, gear, and permit in a specific manner. Both parties thus allege the same property right-the continued use of plaintiff's vessel, gear, and permit to harvest swordfish in the Atlantic Swordfish Fishery.

The government's overarching argument is that plaintiff's claimed interest is not a protectable property interest, but an interest closer to that of a revocable license or privilege. In making this claim, the government first argues that pervasive industry regulation bars the formation of a property interest. Second, the government claims plaintiff's permit merely grants a privilege. Third, plaintiff's permit lacks any indicia of a private property interest. Finally, the government asserts that the right to use the vessel, gear, and permit with gillnets is not a property interest, but a "collateral" interest, which is unprotected by the Fifth Amendment.

First, the government argues that the comprehensive regulation of the Atlantic Swordfish Fishery bars the creation of a property right. Plaintiff argues that although "the license to fish is regulated . . . once issued, investment made on the expectation of being able to pursue this livelihood are valuable Fifth Amendment protectable interests." Pl Response at 10. Although mere "participat[ion] in a heavily regulated industry" does not bar a plaintiff from ever prevailing on a takings claim, See Maritrans Inc. v. United

States, 40 Fed. Cl. 790, 797 (1998), it does greatly reduce the reasonableness of expectations and reliance on regulatory provisions. See Allied-General Nuclear Serv. v. United States, 839 F.2d 1572, 1577 (Fed. Cir. 1988) (Allied-General did not have a property interest in a nuclear facility permit because it "accepted the regulatory scheme"); Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1027-28 (1992) ("by reason of the State's traditionally high degree of control over commercial dealings, [a purchaser] ought to be aware of the possibility that new regulation might even render his property economically worthless. . ."). This court has held that a permitholder's reliance on a permit, reasonable or not, cannot form a property interest protected by the Fifth Amendment. See Hage v. United States, 35 Fed. Cl. 147, 171 (1996) ("reliance on the privilege to graze . . .[cannot] create a property interest . . ."); Bradshaw v. United States, 47 Fed. Cl. 549, 553 (2000) ("A grazing permit . . . was never intended to become a compensable property right."). Reliance on a permit under a regulatory scheme thus does not mandate the formation of a property right. On the other hand, pervasive regulation does not necessarily bar the formation of a property right. This Court finds that although regulation of the Atlantic Swordfish Fishery does not necessarily preclude plaintiff from obtaining a property interest, plaintiff's reliance on his permit cannot confer a property interest upon him.

Next, the government claims that the fishing permit grants a privilege, not a property interest, to the plaintiff. The government asserts that because the Magnuson-Stevens Act disclaims the creation of property rights by permitholders, Congress' intent is clear: fishery permits do not create property interests. The Act states that a "limited access system authorization [i.e.; permit] shall not create, or be construed to create, any right, title, or interest . . . in any fish . . ." See 16 U.S.C. § 1853(d)(3)(D)(2000). Further, the Act states that nothing shall "limit the authority of a Council to

submit and the Secretary to approve the termination . . . without compensation to holders of any limited access system permits, of a fish management plan, plan amendment, or regulation . . ." See 16 U.S.C. § 1853(d)(2)(A)(2000). Plaintiff argues that this is a "self-serving" statement which "begs the question," i.e., that the government's statement that its own statute or regulation creates no property interest cannot be taken at face value. To the contrary, property interests are often defined by existing rules or understandings. See Lucas, 505 U.S. at 1030; United States v. Fuller, 409 U.S. 488, 494 (1973) ("The provisions of the Taylor Grazing Act . . . make clear the congressional intent that no compensable property right be created . . ."); Alves v. United States, 133 F.3d 1454, 1457 (Fed. Cir. 1998) ("What is compensable is the fee interest only, divorced from other governmentally-created rights or privileges . . ."); Hage v. United States, 35 Fed. Cl. 147, 169-70 (1996) (no property right found because the Act stated no "right, title, interest or estate" was created by a grazing permit's issuance); Bradshaw, 47 Fed. Cl. at 553 ("A grazing permit is a right created by the government and was never intended to become a compensable property right."). This Court finds that the Magnuson-Stevens Act clearly states that plaintiff's permit was not intended to create a property right within the meaning of the Fifth Amendment.

Third, the government argues that plaintiff's alleged property interest is more analogous to a revocable license because the permit lacks the traditional hallmarks of private property. The term property "denotes the group of rights [including] the right to possess, use and dispose" of the claimed interest. See United States v. General Motors Corp., 323 U.S. 373, 377-78 (1945). First, plaintiff's permit lacks an important component of property rights: alienability. As originally granted, plaintiff's permit was not freely alienable, i.e., plaintiff could not transfer, sell, or assign his permit. See

Atlantic Swordfish Fishery, 50 Fed. Reg. 33,952, 33,957 (1985) (codified at 50 C.F.R. § 635.4(1)(1)(2000)).[6] Second, plaintiff lacks "one of the most valuable characteristics of . . . property . . . the right to sole and exclusive possession-the right to exclude. . ." See Mitchell Arms v. United States, 7 F.3d 212, 215 (Fed. Cir. 1993) (no property interest found because comprehensive regulation of the gun importation industry precluded the right to exclude) (quoting Hendler v. United States, 952 F.2d 1364, 1374 (Fed. Cir. 1991)). Third, a private property interest is generally not revocable or alterable by another party. The NMFS, however, retains power to alter the terms and conditions of plaintiff's permit by banning any type of gear, vessels, or equipment. The NMFS may "prohibit, limit, condition, or require the use of specified types and quantities of fishing gear, fishing vessels, or equipment . . ." 16 U.S.C. § 1853(b)(4)(2000), as well as revoke or deny a permit for violations of permit conditions regulations, or statutes. See 15 C.F.R. §§ 904.301(a)(1), 904.320(a) (2000).[7] Plaintiff's permit is thus subject to the NMFS' power to alter its terms. The Supreme Court has held that the power to "alter, amend, or repeal" a statutory provision means there is no property interest in the continuation of the provision's current form. See Bowen v. Public Agencies Opposed to Social Security Entrapment, 477 U.S. 41, 52 (1986) (Congress's reservation of power allowing

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[6] Plaintiff's permit became transferable in 1999, when the Atlantic Swordfish Fishery was changed to a limited access permit system where only past fishery participants were eligible to receive permits. See 50 C.F.R. § 635.4(1)(2)(1999). Previously, however, the permits were not transferable.

[7] Although plaintiff's permit is not revocable at will, it is also not renewable or granted as a matter of right. Compliance with all applicable permit conditions, regulations, and statutes must be maintained.

it to change a provision of the Social Security Act precluded a taking when Congress later repealed the provision).

Finally, the government argues that rather than a property interest, plaintiff has a collateral interest and that "the Fifth Amendment concerns itself solely with the 'property,' . . . and not with other collateral interests which may be incidental to his ownership." See General Motors Corp., 323 U.S. at 378. A collateral interest has been defined as a right not inherent in the ownership of the physical property. See Mitchell Arms, 7 F.3d at 217. In Mitchell, the court found no property interest in plaintiff's right to import guns because that right was not inherent in the ownership of the guns and instead flowed from a permit. See id. at 217. Because the gun importer could have done anything with the guns except import them into the United States, it was only the "ability to realize an expectation in the ultimate market disposition of the rifles" that was affected. See id. at 217. The court found that this "ability" was clearly a collateral interest. See id. at 217. Similarly, plaintiff's interest here is collateral because only his ability to use the permit in a particular manner has been curtailed. The ability to use gillnets to harvest swordfish is not a right inherent in holding a permit nor in the ownership of the gear or the vessel. Further, plaintiff may still use his permit to fish using a different type of gear or to harvest a different type of fish. He may now also sell his permit. This Court, therefore, finds that plaintiff has no property interest in the continued use of his gear, vessel, or permit in a particular manner.

C. Property Rights Derived from State Law

Plaintiff attempts to analogize his claim to cases in which the claimant was found to possess property rights in the right to harvest fish. These cases, however, are inapposite. In each of these state cases, the plaintiff is seeking damages for a public nuisance committed by a

private defendant. See Hampton v. North Carolina Pulp Co., 27 S.E.2d 538 (N.C. 1943); Columbia River Fishermen's Protective Union v. St. Helens, 87 P.2d 195 (Or. 1939); Strandolm v. Barbey, 26 P.2d 46 (Or. 1933); Carson v. Hercules Powder Co., 402 S.W.2d 640 (Ark. 1966); Masonite Corp. v. Steede, 21 So. 2d 463 (Miss. 1945). As such, these cases are not helpful to plaintiff. This case does not involve a nuisance claim nor was plaintiff's permit obtained from a state agency. Plaintiff is operating under a federal permit. The alleged interference with his fishing comes from the federal government itself under its authority to regulate fisheries. These cases thus do not bolster plaintiff's claim.

Plaintiff also cites cases in which this court found that fishermen had protected property interests in the right to fish. See Jackson v. United States, 122 Ct. C1. 197, 206 (1952); Todd v. United States, 155 Ct. C1. 87, 91 (1961). These cases are also inapposite. In Todd, the claimant's license was renewable by right, he was licensed to fish in a specific area, and a statute bestowed a property right upon him. See 155 Ct. C1. at 90-91. In Jackson, the claimant's license had indicia of private property because it was renewable by right and could be devised or sold. See 122 Ct. C1. at 206. Further, the licenses in both Jackson and Todd were state permits with which the Federal Government interfered for reasons unrelated to regulation of the fishing waters. See Jackson, 122 Ct. C1. at 206; Todd, 155 Ct. C1. at 91. The licenses were thus considered to be property as between the fishermen and a third party. Here, plaintiff's permit has no indicia of private property rights, no statute grants him a property interest, and plaintiff operates under a federal permit with which the federal government interfered for reasons related to the regulatory scheme the permit was issued under-the preservation of marine resources.

IV. Conclusion

This Court holds that because plaintiff is subject to a pervasive regulatory scheme, the permit is closely analogous to a revocable license or privilege, and the Magnuson-Stevens Act disclaims any grant of a property interest, plaintiff's claim must fail. Plaintiff has no property right in the continued used of his property to fish with gillnet gear and therefore has no takings claim against the government. Consequently, government's motion to dismiss, filed March 31, 2000, is GRANTED. The Clerk will enter judgment for the defendant. Costs for defendant.

LAWRENCE S. MARGOLIS
Senior Judge, U.S. Court of Federal Claims

January 11, 2001

IN THE UNITED STATES COURT OF FEDERAL CLAIMS

Paul Conti, individually, and, Conti Corporation, as owner of F/V PROVIDENZA

Plaintiffs.

vs.

United States of America,
Defendant.

Case # 99-987-C

Judge Lawrence S. Margolis

Filed December 10, 1999

COMPLAINT AND CLAIM FOR RELIEF

1. This is a claim for just compensation based on the "taking" clause of the Fifth Amendment of the United States Constitution, wherein just compensation is sought for the taking of Plaintiff's property rights by reason of regulatory government action, as described herein, and therefore within the jurisdictional purview of this Court. Jurisdiction of this cause is further established by 28 U.S.C. § 1491.

2. Plaintiff, Paul Conti, is a citizen of the Commonwealth of Massachusetts and resides in the fishing port city of Gloucester, Massachusetts. Plaintiff was 75 years of age at the time he ceased fishing by reason of the government action described herein and earned his livelihood from a lifetime of commercial fishing, not only in the

fisheries of New England, but also and previously in the Mid-Atlantic and Pacific West Coast fisheries. He is the principal stockholder, president and director of Conti Corporation, the owner of the vessel described herein.

3. Since 1979 Plaintiff has fished exclusively with gillnets in pelagic fisheries harvesting swordfish and shark, by the utilization of a specially designed vessel owned by him named the F/V PROVIDENZA, 39' LOA. This vessel was built to be used, according to the Plaintiff's specifications, for gillnet pelagic fishing. The vessel was constructed and rigged in Seattle, Washington in 1979 and used in the Pacific gillnet swordfishery for a time period and eventually sailed to New England. Both the vessel and its gear were purposely designed to take swordfish and shark by the use of drift gillnets. These nets are specially designed and, when set end to end, extend approximately one mile, float beneath the surface between 6 and 10 fathoms, and comprise 20 inch mesh size.

4. Beginning on or about 1985 Plaintiff established full time residency in Gloucester where the F/V PROVIDENZA was permanently harbored, and continued fishing for swordfish in New England waters under a swordfish and shark permit issued to him by the National Marine Fishery Service (NMFS), Plaintiff's only permits.

5. NMFS is a government agency operating under the National Oceanic & Atmospheric Administration (NOAA), of the Department of Commerce. This agency, under the Secretary of Commerce, is authorized by Congress to manage United States fisheries through the Magnuson-Stevens Act, as amended by the SFA, 16 U.S.C. §1801 et seq., the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1361 et seq., 1387, and the Endangered Species Act, (ESA) 16 U.S.C. § 1531 et seq. The harvesting of swordfish in the North Atlantic Ocean up to the boundary of the Exclusive Economic Zone (the Hague Line) is regulated by NMFS, and the Secretary of the Department of

Commerce through its Highly Migratory Species Division, 16 U.S.C. § 1852.

6. Swordfish species in the North Atlantic Ocean are primarily and predominantly harvested by longline fishing gear utilized by vessels considerably larger in size, different in gear configuration and larger in crew number than Plaintiff's vessel. The longliners are capable of extending themselves beyond their home port for weeks at a time, not only to the limits of the Hague Line, but far beyond into international waters, e.g. the Grand Banks. By comparison, the community of swordfish driftnet fishermen in the North Atlantic coast of the United States is an extremely small population comprised of approximately 15 fishermen, and in recent times, only one from Gloucester, the Plaintiff Paul Conti.

7. By reason of a combination of unique factors, including but not limited. To Plaintiff's age, his economic limitations, his acquired fishing skills, the relatively small size and range of the F/V PROVIDENZA, the design of the vessel and its gear, the mesh size and configuration of Plaintiff's nets, the limited permits issued to him by NMFS, the season and location for the harvesting of swordfish, and the average annual days at sea, or Plaintiff's historical fishing effort, and the moratoriums, closures and limits placed by NMFS on other fisheries, Plaintiff cannot transfer or convert either his personal effort or his vessel and gear to any other fishery, and is therefore entirely dependent for his livelihood on the Atlantic swordfish driftnet fishery.

8. Plaintiff is capable of fishing for swordfish annually, for a short time period only, consisting of trips lasting on the average of 12-15 days, usually in the month of July. Plaintiff fishes in the waters bounding the southern edge of Georges Bank, and the northern edge of the Gulf Stream in an average water depth of 300 fathoms, out to the Hague Line, and usually remains at sea on a single trip until his catch is harvested and then landed in Gloucester.

9. On or about July 1997 Plaintiff was making preparations to depart Gloucester and head for the usual fishing grounds, and had fueled, iced and provisioned the vessel for himself and his one crew. Plaintiff then telephoned the United States Coast Guard to report his trip fishing plan and imminent departure, and was first told that gillnet gear had been recently banned from the swordfish fishery in the North Atlantic, totally, by regulations promulgated by NMFS, and instructed not to break dock.

10. The use and possession of gillnets for the Atlantic swordfishery was prohibited by Emergency Order of NMFS published in the Federal Register, 61 Fed. Reg. P. 64486- 87, December 5, 1996, subsequently extended, until Final Rule, 64 Fed. Reg. P. 4055, January 27, 1999, codified at 50 CFR Part 630, for the express purpose of protecting the Northern Right Whale, based on existing data of one Right Whale entanglement in July 1993 with drift gillnet gear, occurring east and south of the 100 fathom curve (southeast of Nantucket Shoals). The Northern Right Whale has been listed as endangered by the ESA prior to the government's action in this case and has a varied history of collisions with ships and entanglement with lobster pot gear, and occasionally with driftnets.

11. No whale has ever been entangled in Plaintiff's gear. Plaintiff does not challenge the government's authority to regulate the migratory fishery, or to protect endangered species. But in the case at bar, proposals submitted by a convened group, the Atlantic Offshore Cetacean Take Reduction Team (AOCTRT) to protect the Right Whale from gear entanglement by less radical measures, were rejected by NMFS which opted, instead, to totally ban driftnet gear in the Atlantic swordfishery. Although the regulatory ban in this matter may have been established for laudatory purpose, Plaintiff believes and therefore alleges that NMFS has failed to comply with all the National Standards mandated by Congress in the

Magnuson-Stevens Act (SFA), namely the adoption of less drastic measures to protect the mammal and consideration of the economic effect on small fishing entities.

12. For the many years in which Plaintiff has engaged in the swordfish gillnet fishery, and invested time and money in this livelihood, he had no expectation that his specialized gear type fishery would be completely banned. Due to the circumstances described in paragraph 5 above, Plaintiff cannot reallocate his resources or profitably use his property or earn his livelihood. Both his property and his business have been taken by government regulation, which has inversely deprived him of the economically viable use and enjoyment of his property. Plaintiff had expected, by the blessing of good health and vigor, to continue fishing for an additional five (5) years before retiring and had accordingly invested substantial money and labor based on that expectation.

13. Plaintiff's average annual income or profit from his fishing effort, determined by historical gross landings revenue, less the expenses of the boat and crew are $15,481. Prior to the government action in this case, the fair market value of the F/V PROVIDENZA was $100,000. By reason of the regulatory ban on driftnets in the swordfishery, the vessel has been rendered valueless, or has severely depreciated, and Plaintiff is forced to sell a boat which he can no longer use. He has incurred a loss of value. The cost and investment in driftnets which can no longer be used is $30,000. The actual cost of fuel and ice in preparation for departure was $450. The fair market value of the swordfish permit prior to the ban was $10,000. Plaintiff calculates his aggregate loss of value in this matter at $215,450.

14. The implementation of both the Emergency Order, and Final Rule, alleged above constitutes a regulatory taking of Plaintiff's property rights, consisting of the F/V PROVIDENZA'S loss of value and dead storage costs (the vessel has been placed on the market for sale), cost of now

useless gillnets, loss of anticipated net revenue for five years, plus expenses incurred in preparing for the 1997 fishing trip, plus the prior value of the swordfish permit; all for which he is entitled to just compensation to be determined by this Court.

WHEREFORE, Plaintiff Paul Conti and Conti Corporation sue and claim against the defendant, United States of America, for just compensation under the Fifth Amendment of the United States Constitution by reason of a taking, by government regulation, of Plaintiffs' property and his ability to earn a livelihood, and pray for trial in this Court and final judgment in an amount to be determined by this Court.

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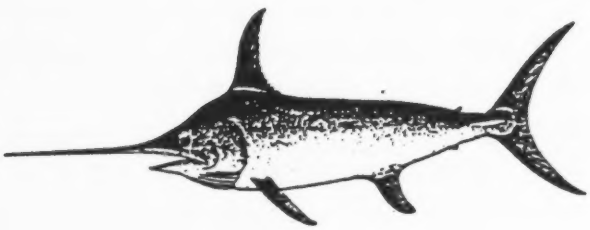
ENVIRONMENTAL ASSESSMENT, REGULATORY IMPACT REVIEW, AND FINAL REGULATORY FLEXIBILITY ANALYSIS FOR A FINAL RULE TO PROHIBIT THE USE OF DRIFTNETS IN THE ATLANTIC SWORDFISHERY



United States Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service
Highly Migratory Species Management Division

December 29, 1998

APPENDIX C. EXPANDED DESCRIPTION OF THE FISHERIES.

C. 1 Introduction

Swordfish are harvested throughout the Atlantic in directed fisheries and as bycatch, principally in pelagic longline fisheries. Within the North Atlantic, major harvesting nations include Spain, the U.S., Canada, and Portugal. Numerous other countries, both members and non-members of ICCAT, harvest lesser amounts. The domestic U.S. fishery for North Atlantic swordfish has historically been dominated by the New England fleet, which operates along the Atlantic coast from New England to Florida and into the Gulf of Mexico. The Florida fleet evolved more

recently using techniques and gear developed by shark fishermen and CubanAmerican longline fishermen.

U.S. Atlantic commercial swordfish fishing is reported to have begun in 1817 as a harpoon fishery off New England. Only the large fish were available to the gear, some weighing as much as 600 lb dw, but averaging about 225 to 300 lb dw at the turn of the century. Because of the limited fishing effort directed towards large, predominately female fish, the stock was sufficient to support a continuously sustainable, fishery for more than 150 years. Combined landings by Canada and the United States were comparable to the current U.S. north Atlantic quota. In the early 1960s, domestic and international pelagic longline vessels began to target swordfish throughout the North Atlantic. Swordfish were targeted particularly during their annual migration along the Canadian and U.S. east coast from spawning areas in the Caribbean Sea and Gulf of Mexico to feeding areas off New England and Canada. The 1984 World Court's Hague Line decision placed the more productive fishing grounds, formerly targeted by U.S. harpooners and later U.S. longline vessels, in Canadian waters. Today, pelagic longline vessels land almost 98 percent of the U.S. domestic commercial swordfish landings and driftnet vessels land less than 2 percent. Minor landings are made by otter trawl vessels fishing for squid, mackerel and butterfish bycatch (primary prey species sought by swordfish) and encountering swordfish as and hand-gear operators (using harpoon, rod and reel, or handline). The U.S. pelagic longline fishery for Atlantic highly migratory species primarily targets swordfish, yellowfin tuna, and bigeye tuna. In addition to primary target species, pelagic longline vessels catch and sell mahi-mahi (dolphinfish), wahoo, bonito, albacore, and skipjack tuna, pelagic and large coastal sharks, and incidentally-caught bluefin tuna. These vessels also incidentally catch billfish, for which no U.S. commercial fishery is allowed, and interact with protected species such as

marine mammals and sea turtles. All prohibited species must be released at sea, regardless of whether alive or dead at the time of capture.

The first quota for U.S. vessels was instituted in 1991 and set at 3,130 mt dw; subsequent quotas were established at 3,429 mt dw for 1992 to 1994, 2,985 mt dw in 1995, 2,625 mt dw for 1996, and 2,464 mt dw for 1997. The establishment of quotas is primarily responsible for the decline in U.S. swordfish landings. However, other factors have also contributed to the reduction (in some years, landings were less than the quota), including a shift of some of the larger U.S. swordfish vessels to the Pacific fleet beginning in 1990, a shift to South Atlantic waters in the early